

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DKS VENTURES, LLC, a Washington
Limited Liability, Co.,

Plaintiff,

v.

REBECCA JOYCE KALCH and STEVEN
LOUIS KALCH, individuals,

Defendants.

No. CV-11-0254-EFS

**ORDER DENYING DEFENDANT
KALCH'S MOTION TO DISMISS AND
GRANTING PLAINTIFF'S MOTION TO
REMAND**

A hearing occurred in the above-captioned matter on October 6, 2011. Plaintiff DKS Ventures, LLC (DKS) was represented by Edward Bruya. Les Weatherhead and Geana Van Dessel appeared on Defendant Rebecca Kalch's behalf. Through her Motion to Dismiss, ECF No. [3](#), Rebecca Kalch seeks dismissal of Plaintiff DKS Ventures, LLC's ("DKS") complaint because 1) there is no personal jurisdiction over her in Washington and 2) DKS's claims must be brought as Federal Rule of Civil Procedure 13(a) compulsory counterclaims in an earlier-filed Missouri lawsuit. Mrs. Kalch also requests an award of attorney's fees and costs under RCW 4.28.185(5) (Washington's long-arm statute). DKS contests Mrs. Kalch's motion, arguing that the parties' Joint Venture Agreement (JVA) contains a reasonable and enforceable forum-selection clause requiring that the parties' disputes be resolved in Spokane County

1 Superior Court. Consistent with its position, DKS filed a Motion to
2 Remand, ECF No. 9, seeking remand to Spokane County Superior Court and
3 requesting an award of attorneys fees and costs under the JVA and 28
4 U.S.C. § 1447(c). Following the filing of these motions, Western
5 District of Missouri U.S. District Judge Dean Whipple dismissed the
6 Kalches' earlier-filed Missouri lawsuit, finding that the JVA selected
7 Spokane County Superior Court as the forum for lawsuits involving the
8 JVA. ECF No. 29-1. After reviewing the submitted material, relevant
9 authority, and hearing from counsel, the Court is fully informed. This
10 Order supplements and memorializes the Court's oral rulings denying Mrs.
11 Kalch's dismissal motion, granting DKS's motion to remand the lawsuit to
12 Spokane County Superior Court, and denying attorneys fees and costs to
13 either party.

14 **A. Facts¹**

15 In 2009 and 2010, Stuart Roberts, who was a resident of either
16 Tennessee or Montana, approached Mrs. Kalch with the idea that he and
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18 ¹ This factual background section is developed by taking the
19 facts in DKS's favor, unless otherwise noted. A motion seeking to
20 render a forum-selection clause unenforceable is a motion under
21 Federal Rule of Civil Procedure 12(b)(3) for improper venue.
22 *Argueta v. Banco Mexicano*, 87 F.3d 310, 324 (9th Cir. 1996). For
23 such a motion, the Court must view the facts in the non-moving
24 party's favor. See *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133,
25 1139 (9th Cir. 2004).

1 his family provide and install commercial ovens and other equipment to
2 expand Becca's Barkery's dog-treat making capabilities in exchange for
3 an ownership interest in Becca's Barkery. Becca's Barkery was owned by
4 Mrs. Kalch and her husband, with Mrs. Kalch operating the business.
5 Mrs. Kalch advised Stuart Roberts that she was interested and, in the
6 spring of 2010, negotiations between she, Stuart Roberts, Dave Roberts
7 (Stuart's father who resides in Montana), and Kevin Roberts (Stuart's
8 brother) began in earnest.

9 Kevin Roberts, who is an attorney in Spokane, Washington, began
10 drafting the JVA to detail the proposed business ("Corporation")
11 agreement. While the details of the JVA were being negotiated, the
12 Roberts began manufacturing the commercial oven in March 2010, which the
13 Roberts anticipated would be ready for delivery to Becca's Barkery in
14 May 2010. Also in March 2010, Stuart Roberts and Mrs. Kalch worked
15 together to get a quote for a new product-bagging machine. In April
16 2010, Dave and Kevin Roberts traveled to Missouri to visit Becca
17 Barkery's operations. Kevin Roberts contends that during this meeting
18 he discussed with Mrs. Kalch the need for the JVA to contain a clause
19 selecting Spokane County Superior Court as the forum to resolve any
20 disputes that may arise between the parties relating to the Corporation.
21 Mrs. Kalch disputes having any discussion relating to a forum-selection
22 clause.

23 On May 13, 2010, Kevin Roberts emailed a draft JVA to Stuart
24 Roberts, Dave Roberts, and Mrs. Kalch for comment. This draft contained
25 a forum-selection clause. Mrs. Kalch suggested revisions, however, she
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1 did not discuss the forum-selection clause. Changes were made that were
2 largely consistent with Mrs. Kalch's suggestions. Thereafter, Kevin
3 Roberts emailed a revised JVA to everyone.

4 Mrs. and Mr. Kalch signed a version of the JVA on May 20, 2010. ECF
5 No. [30](#)-1. Dave Roberts signed another version of the JVA, as DKS's
6 "managing member": his signature is undated. ECF No. [23](#)-2.

7 Unfortunately, delivery of the commercial oven was delayed and it
8 did not perform as Mrs. Kalch expected. According to Mrs. Kalch, Becca's
9 Barkery was unable to fill orders, and its employees suffered burns and
10 other injuries from the new oven. Becca's Barkery has not distributed
11 any income to the Roberts and has not disclosed its financial records to
12 the Roberts.

13 On May 3, 2011, Mr. and Mrs. Kalch filed a lawsuit in Missouri,
14 alleging breach of the parties' oral contract. On June 13, 2011, the
15 Roberts removed the lawsuit to the U.S. District Court for the Western
16 District of Missouri; the case was assigned to Judge Whipple.

17 In the meanwhile, on May 24, 2011, the Roberts filed this lawsuit
18 in Spokane County Superior Court. The Kalches removed the lawsuit to
19 this Court on June 29, 2011.

20 On August 29, 2011, Judge Whipple dismissed and remanded the
21 Kalches' earlier-filed lawsuit to Spokane County Superior Court,
22 enforcing the JVA's forum-selection clause because 1) the parties are
23 bound by the JVA even though DKS was not incorporated when it was signed
24 and 2) Kevin Roberts did not violate the Washington Rules of Professional
25 Conduct (RPC) when drafting the JVA. ECF No. [29](#)-1. The Kalches filed
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1 a motion to reconsider; Judge Whipple has not yet ruled on the
2 reconsideration motion.

3 **B. Res Judicata**

4 Mrs. Kalch argues Judge Whipple's ruling should not be given
5 preclusive effect because he did not fully address her argument that the
6 JVA should not be enforced given that it violates Washington's public
7 policy because Kevin Roberts' interaction with her violated the RPCs.
8 An issue is res judicata if:

9 (1) the issue at stake must be identical to the one alleged in
10 the prior litigation; (2) the issue must have been actually
11 litigated [by the party against whom preclusion is asserted]
in the prior litigation; and (3) the determination of the
issue in the prior litigation must have been a critical and
necessary part of the judgment in the earlier action.

12 *Town of N. Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993)
13 (citation omitted). The Court finds that the all of the issues presented
14 before this Court, including the alleged RPC violations by Kevin Roberts,
15 were fully presented to Judge Whipple and that Judge Whipple's findings
16 on these issues were a critical and necessary part of his judgment. Yet,
17 Judge Whipple has been asked to reconsider his rulings. Accordingly, if
18 there is presently a question as to the finality of Judge Whipple's
19 judgment, the Court addresses the presented issues on its own. See 9
20 A.L.R.2d 984 (noting possible question as to preclusive effect of a
21 judgment that is not yet final). As set forth below, the Court agrees
22 with Judge Whipple's ultimate conclusions.

23 **C. Personal Jurisdiction**

24 Assessing whether the Court has personal jurisdiction over Mrs.
25 Kalch, an out-of-state defendant, would typically start with assessing
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1 Mrs. Kalch's contacts with Washington. However, the JVA contained the
2 following forum-selection clause:

3 Governing Law. This Agreement and any question, dispute or
4 other matter related to or arising from this Agreement shall
5 be governed by the laws of the State of Washington. Exclusive
jurisdiction and venue with regard to this agreement shall be
in the Superior Court, Spokane County, Washington.

6 ECF. No. 31-1 at 21. Based on this forum-selection clause, DKS argues
7 that Mrs. Kalch consented to jurisdiction in Spokane County Superior
8 Court. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985)
9 ("[B]ecause the personal jurisdiction requirement is a waivable right,
10 there are a variety of legal arrangements by which a litigant may give
11 express or implied consent to the personal jurisdiction of the court.").
12 A forum-selection clause in a freely-negotiated contract is presumed
13 valid. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); cf.
14 *Rahco v. Int'l, Inc. v. Laird Elec., Inc.*, 502 F. Supp. 2d 1118 (E.D.
15 Wash. 2006) (declining to enforce the forum-selection clause because it
16 was not negotiated). Mrs. Kalch, therefore, has the burden to establish
17 that 1) the JVA is not an enforceable contract or b) the forum-selection
18 clause itself is unreasonable and unenforceable because:

19 (1) its incorporation into the contract was the result of
20 fraud, undue influence, or overweening bargaining power; (2)
21 the selected forum is so gravely difficult and inconvenient
22 that the complaining party will for all practical purposes be
deprived of its day in court; or (3) enforcement of the clause
would contravene a strong public policy of the forum in which
the suit is brought.

23 *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996)
24 (internal citations and quotations omitted).

1 1. DKS's Status

2 Mrs. Kalch questions the enforceability of the JVA, which was signed
3 by Dave Stuart as DKS's promoter, because DKS was not incorporated until
4 after Mrs. Kalch filed the Missouri lawsuit. DKS argues, and Judge
5 Whipple agrees, that DKS "ratified" the JVA.

6 Although the Court agrees that DKS may seek to enforce the JVA, the
7 Court concludes that either adoption or assumption, rather than
8 ratification, would apply under the circumstances. 1A Fletcher Cyc.
9 Corp. § 207 (2011) ("Ratification is the acceptance of a previously
10 unauthorized contract, which implies an existing person on whose behalf
11 the contract might have been made"); 12 Williston on Contracts
12 § 35:71 (4th ed. 2011) ("[S]trictly speaking, the corporation cannot,
13 when formed, ratify the action of the promoter, since it is an essential
14 of ratification that the principal should have been in existence and
15 capable of contracting at the time the agent acted. . . ."); see also
16 *Collins v. Morgan Grain Co.*, 16 F.2d 253, 254 (9th Cir. 1926) ("[U]ntil
17 the corporation is organized, the writing does not take effect as a
18 contract, because the contemplated party to the contract, on the other
19 side, is not yet in existence, and for this reason, there being no
20 contract, the whole undertaking is inchoate and incomplete, and since
21 there is no contract the party may withdraw."); *Van Noy v. Cent. Union*
22 *Fire Ins. Co.*, 168 Mo. App. 287 (1913) (discussing that a contract
23 entered into on the behalf of a yet-to-be formed corporation may not be
24 ratified because there is truly no contract to ratify). The use of
25 ratification is understandable, however, given that case law has

1 inappropriately used the term. See *Schmidt v. Morival Farms*, 240 S.W.2d
2 952, 958 (Mo. 1951) (utilizing adoption and ratification
3 interchangeably).

4 Unfortunately, the case law and treatises do not clearly state
5 whether the correct principle to apply in this circumstance is "adoption"
6 or "assumption." See 12 Williston on Contracts § 35.71 (utilizing
7 "adoption" language); 1A Fletcher Cyc. Corp. § 207 ("[A]n affirmative
8 corporate act can result in liability assumed, adopted, or arising out
9 of some contracts."). Regardless, it is clear that DKS assumed or
10 adopted its promoter's signing of the JVA by filing this lawsuit, after
11 its incorporation, to enforce the JVA. See 12 Williston on Contracts §
12 35.71 ("[O]ne mode of adopting a contract made on its behalf by promoters
13 is the corporation filing a suit on the contract."). And Mrs. Kalch's
14 filing of the Missouri lawsuit in May 2011 does not repudiate the JVA
15 because she had already accepted an oven and therefore received benefits
16 from the JVA. See *Nat'l Credit Co. v. Casco Co.*, 173 Wash. 275 (1933)
17 ("Having accepted the benefits of the contract, appellant can not
18 repudiate its obligations."); 12 Williston on Contracts § 35.71 ("[U]ntil
19 acceptance, the [entity contracting with the promoter] may withdraw.").

20 In sum, the Court finds that DKS may sue to enforce the JVA and its
21 forum-selection clause.

22 2. Meeting of the Minds

23 In her filings, Mrs. Kalch appears to argue that there was no
24 meeting of the minds because no single version of the JVA was signed by
25 all parties. It does appear that the Kalches signed one version of the
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1 JVA and Dave Kalches signed another version of the JVA. Therefore, there
2 could be a reasonable dispute as to whether there was a meeting of the
3 minds as to the essential terms of the JVA. However, because at this
4 time the facts must be viewed in DKS's favor, and Kevin Roberts declared
5 that Mrs. Kalch agreed that all disputes would be heard in Spokane County
6 Superior Court, the Court must accept that the parties agreed (either
7 orally or in writing) to Spokane County Superior Court as the forum.

8 3. Kevin Roberts and RPCs

9 Mrs. Kalch finally argues that inclusion of the forum-selection
10 clause in the JVA was itself the product of a violation of the RPCs and
11 therefore enforcement of the JVA is against the public policy of
12 Washington. See *McGill v. Hill*, 31 Wn. App. 542 (1982) (recognizing that
13 if the application of a forum-selection clause violates a "fundamental
14 public policy" of Washington, it will not be enforced). She argues that
15 Kevin Roberts violated 1) RPC 1.8 by entering into a contract with his
16 own client (Mrs. Kalch) that was against her best interest and 2) RPC 4.3
17 by continuing to speak with her when he knew that she had other counsel.

18 RPC 1.8 prohibits a lawyer from entering into a business transaction
19 with a client without that client consenting in writing to proceed. See
20 RPC 1.8(a) (listing the three steps that must occur if the lawyer is to
21 enter a business transaction with a client). Under the circumstances,
22 the Court finds that an attorney-client relationship was not created
23 between Kevin Roberts and Mrs. Kalch and therefore RPC 1.8 does not
24 apply. An attorney-client relationship is formed when the client
25 reasonably believes that an attorney-client relationship exists based on

1 the totality of the circumstances, including the attorney's words and
2 conduct. *Bohn v. Cody*, 119 Wn.2d 357, 363 (1992). It was not reasonable
3 for Mrs. Kalch, a college-educated businesswoman, to believe that Kevin
4 Roberts, a proposed co-owner in the Corporation, was representing her
5 best interests when negotiating the JVA. She submits that Stuart Roberts
6 advised her that Kevin Roberts would provide his legal services to the
7 Corporation. Yet, providing legal services to the Corporation after it
8 is formed is different than providing legal services to Mrs. Kalch during
9 the negotiation of the JVA. Further, the facts must be taken in DKS's
10 favor at this time, and Stuart Roberts submitted a declaration stating,
11 "I did not tell Rebecca Kalch that my brother Kevin Roberts would be
12 acting as her lawyer or contributing legal services for the [Corporation]
13 that was being discussed. The discussions concerning a potential Joint
14 Venture revolved around my brother Kevin participating by providing
15 equipment along with my father." ECF No. [24](#) ¶ 2. Kevin Roberts also
16 filed a declaration contradicting Mrs. Kalch's assertions, stating that
17 he did not advise her that he was representing her or the Corporation but
18 rather that his interest in DKS was to help provide the equipment. ECF
19 No. [23](#) ¶¶ 19 & 20.

20 In addition, the questions that Mrs. Kalch asked Kevin Roberts
21 during the drafting of the JVA pertained to negotiations and did not
22 include legal advice. In relation to the forum-selection clause
23 discussions, Kevin Roberts states that he discussed having Spokane County
24 Superior Court be the forum where disputes would be resolved in exchange
25 for Mrs. Kalch's stated desire to retain a majority ownership: 51%

1 ownership rather than 50% ownership in the Corporation. ECF No. [23](#) ¶ 40.
2 Under the circumstances, although it may have been reasonable for Mrs.
3 Kalch to believe that once the Corporation was formed Kevin Roberts would
4 serve as the Corporation's attorney, it was not reasonable for Mrs. Kalch
5 to believe that during the negotiation process Kevin Roberts was
6 providing her with legal advice. Therefore, Kevin Roberts did not
7 violate RPC 1.8.

8 Mrs. Kalch's next argument is that Kevin Roberts violated RPC 4.3,
9 which states:

10 In dealing on behalf of a client with a person who is not
11 represented by counsel, a lawyer shall not state or imply that
12 the lawyer is disinterested. When the lawyer knows or
13 reasonably should know that the unrepresented person
14 misunderstands the lawyer's role in the matter, the lawyer
15 shall make reasonable efforts to correct the misunderstanding.
The lawyer shall not give legal advice to an unrepresented
person, other than the advice to secure counsel, if the lawyer
knows or reasonably should know that the interests of such a
person are or have a reasonable possibility of being in
conflict with the interests of the client.

16 There is no question that Kevin Roberts' and Mrs. Kalch's interests were
17 in conflict: Kevin Roberts was negotiating for himself and his family,
18 not Mrs. Kalch. The Court finds that a reasonable person would
19 understand that Kevin Roberts was not disinterested and therefore Kevin
20 Roberts need not have advised Mrs. Kalch to secure the advice of other
21 counsel. Regardless, Kevin Robert states that he asked Mrs. Kalch
22 whether she was represented by an attorney; she responded yes, and when
23 he inquired as to her attorney's name, she advised that she wanted to
24 proceed without involving her attorney. ECF No. [23](#) ¶¶ 15 & 37.

25 For these reasons, the Court finds, consistent with Judge Whipple,
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1 that the JVA and its forum-selection clause did not violate Washington's
2 public policy as recognized by the RPCs.

3 D. Summary

4 Because, according to DKS, Mrs. Kalch consented to have all disputes
5 between the parties relating to the Corporation resolved in Spokane
6 County Superior Court, the Court finds Mrs. Kalch agreed to personal
7 jurisdiction in Washington. See Fed. R. Civ. P. 4(k) ("Serving a Summons
8 . . . establishes personal jurisdiction over a defendant . . . who is
9 subject to the jurisdiction of a court of general jurisdiction in the
10 state where the district court is located."). Mrs. Kalch's motion to
11 dismiss is denied in part.

12 C. **Rule 13(a) (and Remand)**

13 Mrs. Kalch initially asked this Court to find that DKS's claims were
14 required to be brought in the Missouri lawsuit as compulsory
15 counterclaims under Federal Rule of Civil Procedure 13(a), which states,
16 "A pleading must state as a counterclaim any claim that—at the time of
17 its service—the pleader has against an opposing party if the claim . .
18 . arises out of the same transaction or occurrence." Fed. R. Civ. P.
19 13(a). Clearly, DKS's claims in its May 24, 2011 Spokane County-filed
20 lawsuit are compulsory to those claims filed by the Kalches in Missouri
21 on May 3, 2011. Typically, the "first-to-file" rule would allow this
22 Court to transfer this second lawsuit to Missouri. See *Cedars-Sinai Med.*
23 *Ctr. v. Shalala*, 125 F.3d 765, 769 (9th Cir. 1997).

24 However, the Missouri court has since dismissed that lawsuit
25 because, according to DKS, Mrs. Kalch agreed to have the parties'

1 disputes resolved in Spokane County Superior Court. Accordingly, The
2 Court grants DKS's motion to remand this lawsuit to Spokane County
3 Superior Court, where Mrs. Kalch may assert her Missouri claims as
4 compulsory counterclaims. *See Pacesetter Sys., Inc. v. Medtronic, Inc.*,
5 678 F.2d 93, 95 (9th Cir. 1982) (recognizing that the first-to-file rule
6 "is to be applied with a view to the dictates of sound judicial
7 administration.").

8 **D. Attorneys Fees**

9 Both parties ask the Court to award attorneys fees: 1) Mrs. Kalch
10 under RCW 4.28.185(5), and 2) DKS under the JVA's attorney-fees provision
11 and 28 U.S.C. § 1447(c) ("An order remanding the case may require payment
12 of just costs and any actual expenses, including attorney fees, incurred
13 as a result of removal."). Given the Court's above rulings, Mrs. Kalch
14 is not entitled to attorneys fees under RCW 4.28.185. And the Court
15 declines to award attorneys fees under either § 1447(c) or the JVA. Both
16 parties are to bear their own fees and costs associated with this
17 lawsuit.

18 **E. Conclusion**

19 Accordingly, **IT IS HEREBY ORDERED:**

- 20 1. Mrs. Kalch's Motion to Dismiss, **ECF No. 3**, is **DENIED**.
- 21 2. DKS's Motion to Remand, **ECF No. 9**, is **GRANTED** (remand) **and**
22 **DENIED** (attorney's fees) **IN PART**.
- 23 3. **Judgment** is to be entered in DKS's favor without prejudice.
- 24 4. All pending hearings and deadlines are **STRICKEN**.
- 25 5. This lawsuit is to be **REMANDED** to Spokane County Superior
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1 Court, Case No. 11202145-3.

2 5. This file shall be **CLOSED**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter
4 this Order and provide copies to counsel and Spokane County Superior
5 Court.

6 **DATED** this 12th day of October 2011.

7
8 s/ Edward F. Shea
EDWARD F. SHEA
9 UNITED STATES DISTRICT JUDGE

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